DIRECTOR-GENERAL OF INLAND REVENUE v. A.L.B. CO. SDN. BHD.

[A.C.J. (Hashim Yeop A. Sani J.) May 30, 1974]
[Kuala Lumpur — Originating Motion No. 16 of 1973]

Income Tax — Company renting out premises originally intended for tobacco business — Liability to tax for rents — Whether company entitled to have the losses from tobacco business set off against rental income — Whether unabsorbed capital allowances can be set off against rental income — Income Tax Act, 1967, ss. 4, 5, 42, 43 and Sch. 3, para. 75.

In this case the respondent company was incorporated with the object *inter alia* of carrying on a tobacco business. For this purpose it purchased land and built a factory. Subsequently the company found that it was not profitable to carry on the tobacco business and it ceased to do so. The land and buildings were let out to other companies. The company was assessed for income tax on the rental income and it sought to have the unabsorbed losses on the tobacco business and the unabsorbed capital allowances set off against the rental income. The claims were disallowed by the Director-General of Inland Revenue but an appeal was allowed by the Special Commissioners. The Director-General appealed by way of case stated to the High Court.

Held: (1) under section 43 of the Income Tax Act 1967, the statutory income of each of the sources of income of a business are aggregated and it is this aggregate sum from which "unabsorbed losses" are deducted. The Special Commissioners were therefore correct in allowing the unabsorbed losses in this case to be set off;

(2) the capital allowances which were due to the respondent company only related to the tobacco business and therefore the unabsorbed capital allowances could not be taken into account in computing the incomes received from rental received by the respondent company.

Cases referred to:-

(1) *London County Council* v. *Attorney General* [1901] A.C. 26 at p. 35, 36; 4 T.C. 265 at p. 293.
(2) *Hill* v. *William Hill (Park Lane) Ltd.* [1949] 2 All E.R. 452 at p. 461.
(3) *Fry* v. *Salisbury House Estate Ltd.* 15 T.C. 266.
(4) *Commissioners of Income Tax* v. *Hanover Agencies Ltd.* [1967] 1 All E.R. 954.
(6) *Edwards* v. *Bairstow & Harrison* [1956] A.C. 14; 36 T.C. 207.

CASE STATED.

Mohamed Nizar bin Idris (Federal Counsel) for the appellant.

J. J. Puthucheary for the respondents.

Hashim Yeop A. Sani J.: This is an appeal by way of Case Stated by the Special Commissioners of Income Tax under paragraph 34 of Schedule 5 to the Income Tax Act, 1967 on the requisition of the Director-General of Inland Revenue, the appellant.

The facts of the case as found by the Special Commissioners are briefly as follows. The respondent company was incorporated on 2nd September, 1960, with the object, *inter alia*, of carrying on a tobacco business. For this purpose the company purchased land in Petaling Jaya and built a factory to house cigarette machinery and a bonded warehouse for stocks of cigarettes and tobacco. The respondent company commenced its business on 14th February, 1961, and was initially concerned with cutting and blending tobacco leaves and to bring them to a condition suitable to be rolled into cigarettes. The company subsequently found that it was not profitable to carry on with its tobacco business and it ceased to operate its machinery in November, 1961, only about nine months after commencement. It also ceased trading in tobacco in 1964 and had no sale of tobacco in 1965. Eventually, in 1967, the plant and machinery were sold and removed from the factory. From April, 1964, the respondent company started granting licences to various companies for the use and occupation of its premises in return for a monthly rental. At first it let out only a part of its premises but with effect from October, 1968, the company granted a licence to Gammon South East Asia Berhad for the use and occupation of all its land and buildings erected thereon.

In the tax computation of the respondent company for the years of assessment 1963-1970, prepared by the Department of Inland Revenue, dated 22nd August, 1970, a loss of $399,303 and a capital allowance of $82,662 are shown for the year of assessment 1965 and subsequent years of assessment. Both these sums remain unabsorbed at the bottom of the computation which ends with the year of assessment 1970.

For the years of assessment 1968 and 1970 the respondent company was assessed to income tax on the sum of $7,040 and $33,234, respectively, as income in respect of rents under section 4(d) of the Income Tax Act, 1967. The respondent company's claim to have the unabsorbed losses amounting to $399,303 and the unabsorbed capital allowances amounting to $82,662 to be set off against the rental income was disallowed by the Director General of Inland Revenue for both the years of assessment 1968 and 1970.

It was contended on behalf of the Director General of Inland Revenue that although one of the objects in the Memorandum of Association of the respondent company allowed it to lease out its property, since the respondent company had in fact ceased its tobacco business in 1964 which was the main object of the respondent company, therefore for the years of assessment 1968 and 1970 the respondent company had been properly assessed under section 4(d) of the Income Tax Act, 1967 as income in respect of rents and therefore the respondent company cannot claim any deductions for unabsorbed loss and the unabsorbed capital allowances in respect of its tobacco business which it had ceased to operate.

On behalf of the respondent company it was however argued that the unabsorbed losses and unabsorbed capital allowances in respect of the respondent company's tobacco business should be allowed as deductions against the company's income from rents from its premises as all the objects in the Memorandum of Association must be considered as business objects of the company and that letting of its property is one of the objects in the Memorandum of Association and therefore it cannot be said that the company was no longer doing business after it had ceased to operate its tobacco business.

Before this court the following legal points were argued, namely —

(1) The sources of income specified in section 4 of Income Tax Act, 1967 are "mutually exclusive" and therefore rents cannot be a part of business income for the purpose of taxation. This proposition was put forward by counsel for the Director General of Inland Revenue. In support of this contention counsel re-

lied on *London County Council* v. *Attorney General*,[1] *Hill* v. *William Hill (Park Lane) Ltd.*,[2] and *Fry* v. *Salisbury House Estate Ltd.*[3] The very eloquent submission by this counsel deserves praise who also correctly drew the attention of the court to the Privy Council case *Commissioners of Income Tax* v. *Hanover Agencies Limited*.[4]

Counsel for the respondent company distinguished the authority of *London County Council* v. *Attorney-General, supra*, and relied on the *Commissioners of Income Tax* v. *Hanover Agencies Limited, supra*, as more persuasive on the point.

(2) It is contended on behalf of the Director General of Inland Revenue that the Memorandum of Association of the respondent company alone is insufficient for the Commissioners to draw a conclusion that the respondent company was "conducting a business". It is argued by counsel that since the appeal to the High Court only lies on a question of law it is important that the question of law should be distinguished from questions of fact. It is contended that the problem before the court is whether the Commissioners could properly on certain findings of primary fact draw or infer those conclusions. Citing the case of *Edwards* v. *Bairstow & Harrison*[5] it is contended that this question becomes a question of law.

(3) Finally it was argued by counsel for Director General of Inland Revenue that the unabsorbed capital allowances which were given to the respondent company in respect of its tobacco business should not be taken into consideration when computing their rental income. This proposition is based on the construction that the unabsorbed capital allowance in respect of *one* source of business cannot be set off against profits of that business derived from *other* sources.

Let me deal first with the second point which can be disposed of easily. The Commissioners made their finding in clear terms as follows: —

"We were of the opinion that the respondent company was carrying on the business for which it was incorporated when it commenced to grant licences over its property after it had ceased its initial tobacco business in 1964."

The Commissioners came to this finding obviously on the ground that all the objects in the Memorandum of Association must be considered as business objects of the company and one of such objects is that the respondent company may lease out its property or other assets and as such the leasing out its premises constituted a business of the respondent company. In my view the Commissioners' finding here is clearly a finding of fact which I should not disturb. The Commissioners found as a fact that the respondents were doing business of renting its premises when it commenced to grant licences. The appellant has asked the court to come to a different conclusion. Although the question whether the company was carrying on a business was not seriously disputed by the appellant in the Jamaican case of *Commissioners of Income Tax* v. *Hanover Agencies Limited, supra*, the law is succinctly stated on this question at page 687 —

"The word 'business' is of wide import and must be given its ordinary meaning unless the context otherwise requires. The respondents' objects include *inter alia*, acquiring of freehold property and the leasing of all or any of the company's property. If a company's objects are business objects and are in fact carried out, it carries on business (*Inland Revenue Commissioners* v. *Westleigh Estate Co., per* Pollock M.R.). The respondents are engaged in negotiating leases and collecting rents from their properties. This would *prima facie* indicate that they were carrying on business so as to bring them within the terms of section 8(o)."

I do not think that I should go further than this.

I will now come to the more difficult point that is whether the sources of income specified in section 4 of the Income Tax Act, 1967 are "mutually exclusive" and therefore rents cannot be a part of business income for the purposes of taxation. I do not quarrel with the provision of that Act in that each of the paragraphs speaks of a different source of income. But the problem does not end there. In determining whether the provision of that section is "mutually exclusive" one has to go into the scheme of our Income Tax Act. It is not in dispute that income tax for the purposes of our law, as in the case of the U.K. law, is one tax; but whether it is one tax or a conglomeration of different taxes will depend on the scheme of the particular statute. The decision of the Court of Appeal in *Salisbury House Estate Ltd.* v. *Fry, supra*, that the sources of income in U.K. law are "mutually exclusive" was based on the scheme of the U.K. Act. Lord Atkin based his decision on the express provision of section 100 of the Act of 1842 and the fact that each of the Schedules were complete codes for each class of income. On pages 318-9 of the report he states: —

"The scheme of the Income Tax Acts is and always has been to provide for the taxation of specific properties under Schedules appropriated to them and under a general Schedule D to provide for the taxation of income not dealt with specifically. Schedule A provides for the taxation of income derived from property in land; B for income derived from the occupation of land; C for income derived from government securities; E for income derived from employment in public service. It is unnecessary to go further back than the Income Tax Act of 1842, the provisions of which were incorporated in every Customs and Inland Revenue or Finance Act up to 1918, when the present Consolidation Act was passed. I need not repeat the familiar Schedules altered and extended by the Act of 1853. It is only necessary to refer to section 100 of the Act of 1842 which defined the tax to be imposed under Schedule D. 'The duties hereby granted, contained in the Schedule marked D, shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties, as if the same had been inserted under a special enactment. Schedule D. The said last-mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said Schedules A, B or C, and to every description of employment of profit not contained in Schedule E."

"My Lords, nothing could be clearer to indicate that the Schedules are mutually exclusive; that the specific income must be assessed under the specific Schedule; and that D is a residual Schedule so drawn that its various cases may carry out the object so far as possible of sweeping in profits not otherwise taxed. For this reason no doubt the actual Schedule was drawn in the widest terms. 'For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere,' etc. Such language covers income from land in Schedule A and from government securities in Schedule C. Its true meaning is made apparent by section 100. Moreover, the dominance of each Schedule A, B, C and E over its own subject matter is confirmed by reference to the sections and rules which respectively regulate them in the Act of 1842. They afford a complete code for each class of income, dealing with allowances and exemptions, with the mode of assessment, and with the officials whose duty it is to make the assessments. . . ."

Later in his speech at page 320 he stated:

"Believing as I do that the specific Schedules A, B, C and E, and the rules thereunder, contain definite codes applying exclusively to their respective defined subject matters, I find no ground for assessing the taxpayer under Schedule D for any property or gains which are the subject matter of the other specific Schedules."

The charging section in our Income Tax Act, 1967 is section 4 and the manner the chargeable income is to be ascertained is provided in section 5. Section 5(1) (a) to (d) requires that each source be separately treated to determine the basis period, gross income, the adjusted income and statutory income. After the statutory income has been arrived at the aggregation of these incomes will be ascertained in accordance with Chapter 6 of the Act. Section 43(1)(a) requires that statutory incomes from all the sources making up a business should be aggregated. Then this aggregate income is reduced by any reductions falling to be made under sub-section (2) of section 43 and finally to the remaining income the statutory incomes from other sources if any is to be added and in addition falling to be made under Schedule 4. Section 45 of the Act provides that the chargeable income is the total income minus deductions allowed by Chapter 7 of the Act.

Section 4 of the Income Tax Act, 1967 is the charging section and it does not go beyond describing the sources of income upon which tax is chargeable under the Act. Section 5 of the Act provides in sub-section (1) thereof the manner in which chargeable income shall be ascertained and in paragraph (c) it is provided as follows: —

"5.(1)(c) next, his adjusted income from each source (or, in the case of a source consisting of a business, his adjusted income or adjusted loss from that source) for the basis period for that year shall be ascertained in accordance with Chapter 4 of that Part;"

The words "each source" can only mean each source of income for the words in bracket provide that where the source of income consists of "a business" the adjusted income or adjusted loss from that source shall be taken into account. Sources of income consisting of business as distinct from other sources of income are clearly expressed in sub-section (2) of section 5 of the Act which provides as follows: —

"5. (2) For the purposes of this Act, any income of a person from any source or sources, *and any adjusted loss of a person from any source or sources consisting of a business*, may be ascertained for any period (including a year of assessment) notwithstanding that —

(a) the person in question may have ceased to possess that source or any of those sources prior to that period; or

(b) in that period that source or any of those sources may have ceased to produce gross income or may not have produced any gross income."

From the scheme of the Income Tax Act, 1967 it can be seen therefore that although section 4 provides for separate paragraphs relating to separate sources of income all these categories would appear to be joined up in arriving at the aggregate income of a person. This is also clearly expressed in section 43(1) where this sub-section requires the *aggregation* of all the sources that make up a business. Only after aggregating all sources consisting of a business and deductions made of such losses as may have been incurred in previous years are incomes from other sources if any (which must be taken to mean non-business sources) to be added.

Therefore the "mutually exclusive" decision in *Salisbury House Estate Ltd.* v. *Fry, supra*, cannot simply be applied to the Malaysian Income Tax Act without considering the scheme of our own Act. In fact when the Privy Council considered section 5 of the Jamaican Act which although differently worded is clearly nearer to our section 4 than the U.K. Act, at page 688 said: —

"In their Lordships' opinion the decision in the *Salisbury House* case has no bearing on the construction of the provisions of the Income Tax Law of Jamaica where there is no parallel to the division of the charge to income tax into various separate and distinct Schedules. Section 5 already referred to is an omnibus section which treats all profits and gains together whether arising from property or from a trade, business, employment or profession, or in respect of rent or emoluments, salaries or wages. These are all treated as profits or gains."

The same is true of the Malaysian section. Whether rents, royalties or premiums are gains or profits from a business depends on whether they are derived from a business.

In the Jamaican case the taxpayer was dealing in hardware and lumber and operated a wharf and let out premises to tenants. They also dealt in dry goods and ran a picture house. They manufactured building blocks and had an insurance sub-agency. The Memorandum of Association as in the case of the respondent company had as an object the acquiring of freehold property and the leasing of all or part of the company's property. The company claimed wear and tear allowances in relation to its building. Under section 8 of the Jamaican Income Tax Law of 1954 wear and tear allowance was only deductable in cases where the owner used the building for the purpose of acquiring the income from a trade, business, profession or vocation carried on by him.

Under section 43 of the Income Tax Act, 1967 the statutory incomes of each of the sources of a business are aggregated and it is this aggregate sum from which "unabsorbed losses" are deducted. For this reason the decision of the Commissioners to take into account the unabsorbed losses amounting to $399,303 should not in my view be disturbed.

The last point to be dealt with is the unabsorbed capital allowances. The Commissioners ordered that the unabsorbed capital allowances amounting to $82,662 should be taken into account and deducted from the company's income received by way of rents from its premises in arriving at the total income of the respondent company for the years of assessment 1968 and 1970. It was the contention of counsel for Director General of Inland Revenue that the unabsorbed capital allowances cannot be taken into consideration when computing the rental income of the respondent company.

Let us now examine the provisions of our Act. In order to arrive at the chargeable income of the respondent company we have to follow the provisions laid down in Part III of the Act. The "basis period" as defined in section 21(1) of the Act refers to a source of income as defined in section 2 of the Act. The provision of section 21(1) is of course to make provision

that each taxpayer can have different sources of income. The provisions of Part III provide for the treatment to be given for each of these sources. Different sources as provided by this Part are to be treated separately until the aggregate income is arrived at. The gross income of the respondent company for those periods is not in dispute. From this gross income adjustments have to be made as provided in Chapter 4.

Next we go to Chapter 5. It is only covered by section 42. It is to be observed from the wording of section 42 that statutory income is to be calculated from *each* source. The statutory income in respect of each source and if a taxpayer has more than one source then the statutory income must be computed from each source. Section 43(1)(a) also speaks of *each* of business sources consisting of a business indicating that a business income can have several sources. Section 43(1)(a) allows deductions which include unabsorbed losses to be deducted from *all* the taxpayer's *business* sources. However in the treatment of unabsorbed capital allowances it would appear that the Act allows such allowances to be given only to that particular source even if it is a business source. In other words capital allowances incurred for one business should never be taken into account when computing the income from another business source.

Section 42 of the Act provides that the statutory income of a person from a source for a year of assessment shall consist of an amount reduced by the amount of any *allowances* or the aggregate of the allowances falling to be made for that year under the schedule in relation to that source. The schedule that grants the allowances is schedule 3 in which paragraph 75 reads as follows: —

"75. Where, by reason of an insufficiency or absence of adjusted income of a person from a business of his for the basis period for a year of assessment or by reason of the existence of an adjusted loss from the business for that period, effect cannot be given or cannot be given in full to any allowance or to the aggregate amount of any allowances falling to be made to him for that year in relation to the source consisting of that business, that allowance or that aggregate amount, as the case may be, which has not been so made (or so much thereof as has not been so made to him for that year) shall be deemed to be an allowance to be made to him for the first subsequent year of assessment for the basis period for which there is adjusted income from that business, and so on for subsequent years of assessment until the whole amount of the allowance or that aggregate amount to be made to him has been made to him."

It is clear therefore from this paragraph that such allowances are given only to that source consisting of that business.

Paragraph 75 of schedule 3 of the Act is explicit in its distinction between "income from a business" and "income from a source consisting of that business". It would appear that paragraph 75 of schedule 3 is a special provision in the application of capital allowances. The contention of counsel for respondent company that paragraph 60 when read in conjunction with the definition of what is an "industrial building" in paragraph 63 of the schedule has no merit on the facts of this case. It is to be observed that the respondent company is still the "A.L.B. Co. Sdn. Berhad" although for the moment due to business difficulties it is engaged in granting licences to others for the use and occupation of their premises. In my view to avail itself to paragraph 60 of Schedule 3, the respondent company must also satisfy the second limb of sub-paragraph (c) of paragraph 63 of the Schedule that is, its business must consist or mainly consists of the hiring of storage space to the public. We cannot say that of the respondent company.

Applying paragraph 75 to the present case the capital allowances which were due to the respondent company only related to its tobacco business. Therefore the unabsorbed capital allowances cannot be taken into account in computing the incomes received from rental received by the respondent company. The order of the Commissioners is amended accordingly and the appeal is to that extent allowed.

There shall be no order as to costs.

Order accordingly.

Solicitors: *Skrine & Co.*

PIT STOP AUTO ACCESSORIES v. TAN KOCK SIANG; THE MINISTER OF COMMUNICATIONS (APPLICANT)

[O.C.J. (Ajaib Singh J.) May 30, 1974]
[Kuala Lumpur — Civil Suit No. 1191 of 1973]

Practice and Procedure — Writ of subpoena ad testificandum — Application to set aside — Writ not issued bona fide — Abuse of process of court — R.S.C., 1957, O.72 r.2.

In this case the Minister of Communications applied by way of summons-in-chambers that the writ of *subpoena ad testificandum* issued on behalf of the plaintiffs be set aside on the ground that the issue of the said writ was vexatious and an abuse of the process of the court.

The plaintiffs and the defendant in Civil Suit No. 1191 of 1973 were litigating over the terms of an agreement one of the clauses of which expressly stated that the agreement was conditional upon the coming into force of the law requiring the use of safety helmets by motor-cyclists and scooterists. The law had not at the time of the suit come into operation. The plaintiffs issued the writ of *subpoena ad testificandum* and served it on the applicant or his representative to give evidence on behalf of the plaintiffs as to why the law had not yet been introduced. The applicant in his affidavit in support of the application stated that:

(1) neither he nor any of the officials in his Ministry had any knowledge of the matters in Civil Suit No. 1191 of 1973 and were not in any position to give any relevant evidence;

(2) neither the applicant nor any of the officials in his Ministry was in a position to give evidence on matters relating to the policy or implementation of any law which matters are the collective responsibility of the Cabinet; and

(3) it is highly against the public interest to require any Minister or any public official to disclose to any person the policy and the implementation of any law prior to its publication as such disclosure would be detrimental to interests of the State.

The plaintiffs contended *inter alia* that the application was premature. The Minister should claim privilege from disclosing official matters at the appropriate time when giving evidence on behalf of the plaintiffs in the civil suit.

Held: (1) the Minister or his representative was in no position whatsoever to give relevant evidence in the dispute between the plaintiffs and the defendant. Whatever policy the Government may have in relation to safety helmets the plaintiffs' case against the defendant depended on the validity of the agreement between them based on facts which were not within the knowledge of the applicant or his representative;